Tempil Perkakas Sdn Bhd v Foo Sex Hong (t/a Agrodrive Engineering)

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-11-87-95
ABDUL KADIR SULAIMAN J
31 JULY 1996

Evidence *— Hearsay — Statement made in the ordinary course of business — No personal knowledge — Whether evidence admissible —Whether made in the ordinary course of business — Evidence Act s 32(1)(b)*

Evidence *— Documentary evidence — Invoice and delivery order — Makers of documents absent — No explanation regarding their absence — Discretion to be used — Evidence Act 1950 s 73A*

Evidence *— Documentary evidence — Facsimile — Not tendered by the receiver — Whether admissible*

The plaintiff/appellant sued the defendant/respondent for the price of goods sold and delivered amounting to RM20,567.09. In its defence the defendant/respondent contended that some of the goods sent were not of merchantable quality and were thus rejected and that payment made was in respect of those of merchantable quality. The claim made by the appellant was based on the invoices dated from July 1992 to September 1992 and on the evidence of PW1, the sole witness for the appellant who described the procedure of the company's business when receiving any orders for goods to be delivered. PW1 admitted however that he did not have personal knowledge of the events prior to his joining the company as the persons who were responsible for the management of the appellant company were his predecessor, Lee Cheng Wah and the managing director, John Lee. The whereabouts of these two persons were not known. At the close of the appellant's case and after the respondent informed the learned magistrate that he did not wish to call any witnesses and wished to elect to submit on a 'no case to answer', counsel for the appellant indicated to the court that he wished to recall PW1 to tender a facsimile letter sent by the respondent to the solicitors representing the appellant. The letter purportedly containing an admission by the respondent of the debt due to the appellant was dated 9 March 1993 and marked as 'ID(P)38'. The learned magistrate dismissed the appellant's action on the ground that it had failed to prove its case on the balance of probability. The appellant is now appealling and the issues for consideration are: (i) whether PW1's evidence should have been admitted in the light of s 32 of the Evidence Act 1950 ('the Act'); (ii) whether the various documentary exhibits are admissible pursuant to s 73A of the Act; (iii) whether the facsimile letter was admissible; and (iv) whether the appellant could recall PW1 to adduce further evidence after the close of the case of the appellant and after the respondent informed the learned magistrate that he did not wish to call any witnesses and wished to elect to submit on a 'no case to answer'.

Held, dismising the appeal:

(1) The evidence of PW1 in respect of events prior to the date of his appointment was clearly hearsay evidence and is therefore inadmissible. PW1 had no personal knowledge of the facts stated in his evidence and of the contents of the documents that he tendered in support of his evidence (see p 547E–F).

(2) Anything said or tendered through a witness which is not within the actual knowledge of the witness would remain inadmissible notwithstanding the omission to object by the opposing party. The opposing party cannot be taken to have admitted to what had been said and tendered (see p 547D–E).

(3) Section 32(1)(b) of the Act cannot apply here in light of the fact that the ordinary course of business described by PW1 was for the period after he was appointed in the appellant company in 1994. He had no personal knowledge of the course of business in the appellant company before his appointment (see p 547H).

(4) In this case the amount of the claim was far from small and the absence of the makers of the various invoices and delivery orders was not explained at all, apart from it being said that the previous accountant and the managing director had left the service before PW1's appointment. Section 73A of the Act therefore cannot be used by the appellant to assist it here (see pp 547I–548D); *Borneo Co (M) Sdn Bhd v Penang Port Commission* [1975] 2 MLJ 204 distinguished.

(5) Although the fascimile letter was a document within the meaning of s 3 of the Act, it was rightly rejected as it was not brought in by the receiver of the facsimile message, someone from the firm of solicitors for the appellant. PW1 had no personal knowledge to testify to the matter (see p 548F–G).

(6) Introducing evidence after the close of the case for the appellant amounts to introducing new evidence since the appellant had decided to close its case. Furthermore if the document was in the possession of the appellant, there was no reason for the appellant to have kept it in its sleeve and to have disclosed it only after the close of its case (see p 548G–H).

[Bahasa Malaysia summary

Plaintif/perayu telah mendakwa defendan/penentang untuk harga barang-barang yang dijual dan diserahkan yang berjumlah RM20.567.09. Dalam pembelaannya defendan/penentang telah berhujah bahawa sebahagian daripada barang-barang tersebut bukan bermutu boleh dagang. Tuntutan yang dibuat oleh perayu adalah berdasarkan invois-invois yang bertarikh dari Julai 1992 sehingga September 1992 dan berdasarkan keterangan PW1, yang merupakan saksi tunggal perayu, yang telah menjelaskan prosedur urusniaga syarikat ketika menerima tempahan barang-barang untuk diserahkan. Walau bagaimanapun PW1 telah mengaku bahawa dia tidak

mempunyai pengetahuan persendirian akan apa yang berlaku sebelum dia mula bekerja dengan syarikat itu kerana orang yang telah bertanggungjawab atas pengurusan syarikat perayu adalah orang yang memegang jawatan sebelumnya, Lee Cheng Wah dan pengarah urusannya, John Lee. Tiada sesiapa yang mengetahui di mana mereka berada. Di akhir kes perayu dan setelah penentang telah memberitahu majistret bahawa ia tidak berniat untuk memanggil mana-mana saksi dan bahawa ia ingin membuat pilihan untuk berhujah berdasarkan 'tiada kes untuk dijawab', peguam bagi pihak perayu telah memberitahu mahkamah bahawa dia berhasrat untuk memanggil semula PW1 untuk mengemukakan surat faksimile yang dihantar oleh penentang kepada peguamcara yang mewakili perayu. Surat itu yang kononnya mengandungi pengakuan hutang yang harus dibayar kepada perayu bertarikh 9 Mac 1993 dan ditandakan sebagai 'ID(P) 38'. Majistret yang bijaksana telah menolak tindakan perayu atas dasar bahawa ia telah gagal membuktikan kesnya atas imbangan kebarangkalian. Perayu sekarang merayu dan isu yang harus dipertimbangkan adalah: (i) sama ada keterangan PW1 harus diterimamasuk memandangkan s 32 Akta Keterangan 1950 ('Akta tersebut'); (ii) sama ada keterangan dokumentari yang pelbagai itu boleh diterimamasuk menurut s 73A Akta tersebut; (iii) sama ada surat faksimile boleh diterimamasuk; dan (iv) sama ada perayu boleh memanggil semula PW1 untuk mengemukakan keterangan tambahan setelah berakhirnya kes perayu dan setelah penentang telah memberitahu majistret yang bijaksana bahawa ia tidak berniat untuk memanggil mana-mana saksi dan bahawa ia ingin membuat pilihan untuk berhujah berdasarkan 'tiada kes untuk dijawab'.

A B C D E F G H I

Diputuskan, menolak rayuan itu:

(1) Keterangan PW1 berkenaan dengan apa yang telah berlaku sebelum tarikh perlantikannya jelas adalah keterangan dengarcakap dan tidak boleh diterimamasuk. PW1 tidak mempunyai pengetahuan persendirian mengenai fakta yang dinyatakan dalam keterangannya dan mengenai dokumen yang dikemukakan untuk menyokong keterangannya (lihat ms 547E–F).

(2) Apa-apa yang dikatakan atau dikemukakan melalui seorang saksi yang tidak termasuk dalam pengetahuan sebenar saksi tersebut tidak boleh diterimamasuk, tanpa mengira fakta bahawa tidak ada bantahan oleh pihak bertentangan. Pihak yang bertentangan tidak boleh dianggap sebagai mengaku kepada apa yang dikatakan dan dikemukakan (lihat ms 547D–E).

(3) Seksyen 32(1)(b) Akta tersebut tidak terpakai dalam keadaan ini memandangkan fakta bahawa perjalanan urusan yang biasa seperti yang dijelaskan oleh PW1 adalah untuk tempoh masa setelah dia telah dilantik dalam syarikat perayu dalam tahun 1994. Dia tidak mempunyai pengetahuan persendirian mengenai perjalanan urusan yang biasa syarikat perayu sebelum perlantikannya (lihat ms 547H).

(4) Dalam kes ini jumlah yang dituntut adalah jauh daripada kecil dan ketidakhadiran pembuat invois yang pelbagai itu dan arahan hantar-serah telah tidak dijelaskan langsung, selain daripada perayu menyatakan bahawa akauntan dan pengarah urusan telah meninggalkan perkhidmatan mereka sebelum perlantikan PW1. Maka s 73A Akta tersebut tidak dapat membantu perayu di sini (lihat ms 547I–548D); *Borneo Co (M) Sdn Bhd v Penang Port Commission* [1975] 2 MLJ 204 dibeza.

(5) Walaupun surat faksimile merupakan suatu dokumen menurut makna s 3 Akta tersebut, ianya telah ditolak dengan wajarnya kerana ianya tidak dikemukakan oleh penerima utusan faksimile itu, iaitu seorang dari firma peguamcara untuk perayu. PW1 tidak mempunyai pengetahuan persendirian untuk memberi keterangan mengenai perkara tersebut (lihat ms 548F–G).

(6) Tindakan mengemukakan keterangan setelah berakhirnya kes perayu berjumlah kepada mengemukakan keterangan baru oleh kerana perayu telah mengakhiri kesnya. Tambahan lagi jikalau dokumen itu berada dalam milikan perayu, maka perayu tidak ada sebab untuk menyembunyikannya dan untuk memperlihatkannya hanya selepas kesnya ditutup (lihat ms 548G–H).]

[*Editorial note*: The appellant has filed for leave to appeal to the Court of Appeal]

Notes

For cases on ordinary course of business in law of evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue), paras 1058–1059 and 1061.

Case referred to

Borneo Co (M) Sdn Bhd v Penang Port Commission [1975] 2 MLJ 204

Legislation referred to

Evidence Act 1950 ss 3, 32(1)(b), 73A

Gurmeet Kaur Sidhu (*Shearn Delamore & Co*) for the plaintiff/appellant.
PL Wong (*WK Yap, Loo & Co*) for the defendant/respondent.

Abdul Kadir Sulaiman J: The appellant is appealing against the decision of the learned magistrate in dismissing its claim with costs against the respondent for goods sold and delivered at their request amounting to RM20,567.09 and costs amounting to RM575. The dismissal is for the reasons stated in the learned magistrates' grounds of judgment at p 62 of the appeal record. The facts of the case are well presented in the said grounds of judgment and I need not elaborate any further except to

address specific areas when dealing with the grounds of appeal by the appellant. A

It is trite law that generally a person who asserts must prove his assertion on the balance of probability in order to succeed, unless a presumption operates in favour of the assertor wherein the evidential burden shifts in favour of the assertor. In this case, by its pleadings, the appellant in the court below alleged that the respondent owed it a sum of RM20,567.09 being the price of goods sold and delivered to the respondent at its request. The appellant relied on the invoices and delivery notes issued by it to the respondent. A total of 18 invoices were involved in the dealings. Of the total amount involved in the invoices, the respondent paid only a sum of RM4,454.78 leaving a balance of RM20,567.09, the subject matter of the claim. In its defence the respondent denied the allegation and contended that some of the goods sent were not of merchantable quality and were thus rejected and that the payment made was in respect of those of merchantable quality. It is again trite law that parties are bound by their pleadings. At the trial before the learned magistrate, the appellant called only one witness in support of its case while the respondent did not call any on a submission of no case to answer. B C D

At the close of the appellant's case, learned counsel for the respondent informed the learned magistrate that he did not wish to call any witness and wished to elect to submit on a 'no case to answer'. Upon hearing this, learned counsel for the appellant indicated to the court that he wished to recall PW1, the sole witness for the appellant, to tender one letter sent by the respondent to the solicitors representing the appellant. Learned counsel for the respondent objected on the ground that the letter is a facsimile and therefore not admissible as evidence. Anyway, from the records of the proceedings, the learned magistrate allowed the witness to proceed to give his evidence. PW1's evidence is simply that he had seen the letter before it being shown to him by learned counsel for the appellant. The letter was marked as 'ID(P) 38' and remains so without it being tendered as an exhibit for the appellant. Having heard the submissions by both parties, the learned magistrate at the end of the trial, dismissed the action of the appellant on the ground of failure on the part of the appellant to prove its case on the balance of probability. E F G

According to the record of proceedings commencing at p 13 of the record of appeal, PW1 joined the appellant's company as an accountant in 1994, ie after the events leading to the claim of the appellant against the respondent. The claim by the appellant is based on the invoices dated from July 1992 to September 1992. The facsimile letter, 'ID(P) 38' was dated 9 March 1993. According to his evidence, when he took over the post with the company in 1994 in place of his predecessor, Lee Cheang Wah, from the company's record there were outstanding debts to the company including that of the respondent. He had no documents pertaining to the orders of the goods made by the respondent. PW1 went on to describe the procedure of the company's business when receiving any orders for goods to be delivered. He testified that when somebody places an order for goods with the company, a delivery order would be issued to the customer, whereby the customer would receive the goods, sign and H I

seal it. After that an invoice would be sent to the customer. The customer decides the manner in which the goods are to be delivered to him. PW1 however qualified that the practice he described was in respect of the period after he joined the company, ie in 1994, but not before that. He admitted in cross-examination that he did not have personal knowledge of the events prior to his joining the company. Therefore, the evidence of this single witness in respect of the events prior to the date of his appointment was clearly hearsay evidence as so found by the learned magistrate, and therefore, inadmissible as evidence in support of the appellant's claim against the respondent regarding the invoices and the delivery notes. The persons responsible of the management of the appellant company were Lee Cheng Wah, PW1's predecessor; and John Lee, the managing director who were not in court to testify. PW1 did not know the whereabouts of these two persons.

Learned counsel for the appellant reiterated the submissions in the court below that the documentary exhibits tendered by PW1, in relation to proof of goods delivered to the respondents, cannot be documentary hearsay as so held by the learned magistrate because no objection was taken by the respondent before those exhibits were tendered. The simple answer to that is that it is clear law that if anything is said or tendered through a witness which is not within the actual knowledge of the witness, anything said or tendered would remain inadmissible notwithstanding the omission to object by the opposing party. The opposing party cannot be taken to have admitted to what had been said and tendered. In this case, the witness for the appellant had no personal knowledge of the facts stated in his evidence and of the contents of the documents that he tendered in support of his evidence. His evidence remains hearsay evidence and therefore, inadmissible. In relation to the various exhibits tendered, in the light of the denial by the respondent it is for the appellant to establish those facts stated in them. In this case, PW1 is not competent to testify upon them as he had no personal knowledge of them except to have seen them when he was appointed in 1994. The persons who were responsible for the preparation of some of the documents and who are in custody of some other documents from the respondent are not available to testify in court. The learned magistrate was therefore right in rejecting PW1's evidence and all the exhibits tendered (exhs P1–P37).

Learned counsel persuaded the court below and here to accept the absence of the former accountant and the managing director of the appellant company and to allow PW1 to testify in court pursuant to s 32 of the Evidence Act 1950, in particular under sub-s 1(b). In this case however, the subsection cannot apply as the ordinary course of business described by PW1 was for the period after he was appointed in the appellant company in 1994. He had no personal knowledge of the course of business of the appellant before his appointment in the appellant company.

Learned counsel for the appellant submitted that those various exhibits are admissible pursuant to s 73A of the Act on the ground that to obtain the maker of those statements to testify would result in undue delay or expense. She cited *Borneo Co (M) Sdn Bhd v Penang Port Commission*

[1975] 2 MLJ 204 in support. That case can easily be distinguished because at p 206, the Federal Court was of the opinion that discretion could be exercised on the non-production of the maker of the customs declarations to give evidence, in view of the small amount of claim involved. Lee Hun Hoe CJ (Borneo) said at p 206:

> Considering the small amount of claim it would seem unreasonable to incur expenses very much over the amount of claim by calling the person or persons from England just to give formal evidence relating to the preparation of the documents. This would increase the cost of the proceedings and result in inconvenience and perhaps, delay.

It is however a different sort of situation here. The amount of claim is far from small and the absence of the makers of the various invoices and delivery orders was not explained at all apart from saying that the previous accountant and the managing director had left the service before PW1's appointment. In the light of the denial by the respondent, the appellant in order to succeed must establish its claim that the goods were delivered to the respondent. PW1 is not competent to testify on behalf of the makers of the various invoices and the delivery orders purportedly issued by the appellant. In the circumstances, s 73A of the Act cannot assist the appellant in this case.

As mentioned earlier, after the close of the case for the appellant, the respondent elected not to adduce evidence on the ground of no case to answer. Only then, the appellant obtained the permission of the learned magistrate to recall PW1 to adduce further evidence and in the process he identified a facsimile letter purportedly containing admissions by the respondent of the debt due to the appellant. The said letter was marked as 'ID(P) 38' which appears at p 106 of the record of appeal which is dated 9 March 1993, the time before PW1 joined the establishment of the appellant. Learned counsel for the respondent in the court below objected to its production on ground of admissibility. The letter was not addressed to the appellant but to its solicitors who wanted to put it in evidence through PW1. The learned magistrate while holding that the letter is a document within the meaning of s 3 of the Act rejected it as it was not brought in by the receiver of the facsimile messages, ie someone from the firm of solicitors for the appellant. I would agree with that as PW1 has no personal knowledge to testify to the matter. Further, introducing the evidence at that stage of the proceedings, ie after the close of the case for the appellant, amounts to introducing new evidence, since the appellant had decided to close its case. If the document is in the possession of the appellant I cannot see any reason for the appellant to have kept it in its sleeve and decided to disclose it only after the close of its case.

In the circumstances, I would agree with the findings of the learned magistrate and accordingly, the appeal is dismissed with costs to the respondent.

Appeal dismissed.

Reported by Kanesh Sundrum